

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DUFFY DIEU d/b/a DD Machine

Plaintiff,

v.

JAMES GILBERT HILLWIG, JR, and  
HILLWIG TOOL LLC

Defendants.

CASE NO. C18-5287RBL

ORDER GRANTING MOTION TO  
DISMISS

THIS MATTER is before the Court on Defendant Hillwig’s Motion to Dismiss for Lack of Personal Jurisdiction [Dkt. # 16]. The case involves a dispute over the validity of Hillwig’s U.S. Patent No. 8,901,413, for an invention used to adjust the sights on handguns. Plaintiff Dieu, a Washington resident, makes and sells a competing (and, according to Hillwig, infringing) “universal gun sight pusher tool.”

Hillwig and his business are located in Pennsylvania. Hillwig has no business presence here, no assets here, and has “never set foot in Washington.” In 2015, through an attorney, Hillwig sent Dieu a “cease and desist” letter, claiming that Dieu’s product infringed on his ‘413 patent. Hillwig did not pursue that letter’s threatened litigation. Hillwig also complained to Amazon (which is located here, and was a seller of Dieu’s product) three times in 2017, claiming

1 it was selling an infringing product. Amazon stopped selling Dieu's product. Dieu claims he lost  
2 \$360,000 in sales as a result. Hillwig also posted comments on the internet (specifically, on  
3 Dieu's Amazon product page, and on a YouTube video touting his product). These comments  
4 related to Dieu's infringement and the quality of his product, and claimed that because Dieu stole  
5 his design he "should be in jail." Hillwig's comments also "gloated" about Amazon's removal of  
6 Dieu's product. Finally, Hillwig directed emails and phone calls to Dieu at his Poulsbo home,  
7 making similar claims and threats.

8 Dieu sued here, seeking a declaration that Hillwig's patent is invalid and that Dieu's  
9 product does not infringe. He claims that this Court has personal jurisdiction over Hillwig based  
10 on his conduct.

11 Hillwig seeks dismissal for lack of personal jurisdiction over him or his company. He  
12 claims the following points are "well-settled:"

13 (1) Sending an alleged infringer a "cease and desist" letter is not enough to confer  
14 specific jurisdiction; additional activities related to the enforcement or the defense of the validity  
15 of the patent are required. *Avocent Huntsville Corp. v. Aten Int'l Co.*, 552 F.3d 1324, 1334 (Fed.  
16 Cir. 2008)<sup>1</sup>.

17 (2) A patent owner may similarly send such letters to the infringer's customers, without  
18 subjecting himself to personal jurisdiction in the infringer's home state. *Id.* at 1340.

19 (3) "Stray comments" on the internet like the ones Hillwig posted are not enforcement-  
20 related and are not directed to a specific forum. They too are not enough to confer jurisdiction.

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22 <sup>1</sup> Hillwig correctly argues that in a patent case, the law of the Federal Circuit applies. The  
23 Federal Circuit's personal jurisdiction standards are not materially different than the Ninth  
24 Circuit's, except that it specifically and bindingly opines on what one claiming patent  
infringement can and cannot do without subjecting himself to jurisdiction in the alleged  
infringer's home. *See*, most pertinently, *Avocent Huntsville*, *supra*.

1 Dieu characterizes Hillwig’s conduct as a “three year campaign to disparage Dieu,  
2 interfere with his business, and drive his customers away.” He argues that Hillwig’s forum-  
3 directed activities are not limited to cease and desists letters, but include accusations of criminal  
4 activity and intentional acts, designed to convince Amazon to drop him as a customer, and to  
5 convince potential buyers to look elsewhere. Dieu argues that these activities arise directly from  
6 Hillwig’s claim that Dieu infringes his patent; they are enforcement-related activity.

7 When a defendant moves to dismiss a complaint for lack of personal jurisdiction, the  
8 plaintiff bears the burden of demonstrating that jurisdiction is appropriate. *Schwarzenegger v.*  
9 *Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). Plaintiff cannot simply rest on the  
10 bare allegations of its complaint, but rather is obligated to come forward with facts, by affidavit  
11 or otherwise, supporting personal jurisdiction. *Amba Marketing Systems, Inc. v. Jobar*  
12 *International, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977). Where the motion is based on written  
13 materials rather than an evidentiary hearing, the plaintiff need only make a prima facie showing  
14 of jurisdictional facts. *Schwarzenegger*, 374 F.3d at 800. A prima facie showing means that the  
15 plaintiff has produced admissible evidence, which if believed, is sufficient to establish the  
16 existence of personal jurisdiction. *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995).  
17 Conflicts in affidavits must be resolved in the plaintiff’s favor. *Id.*

18 A court’s personal jurisdiction analysis begins with the “long-arm” statute of the state in  
19 which the court sits. *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d  
20 1114, 1123 (9th Cir. 2002). Washington’s long-arm statute extends the court’s personal  
21 jurisdiction to the broadest reach that the United States Constitution permits. *Byron Nelson Co. v.*  
22 *Orchard Management Corp.*, 95 Wn.App. 462, 465 (1999). Because Washington’s long-arm  
23 jurisdictional statute is coextensive with federal due process requirements, the jurisdictional  
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1 analysis under state law and federal due process are the same. *Schwarzenegger*, 374 F.3d at 800–  
2 01.

3 To exercise personal jurisdiction over a nonresident defendant, that defendant must have  
4 at least “minimum contacts” with the relevant forum state such that exercising jurisdiction “does  
5 not offend traditional notions of fair play and substantial justice.” *Schwarzenegger*, 374 F.3d at  
6 801, citing *International Shoe v. Washington*, 326 U.S. 310, 316 (1945). In determining whether  
7 a defendant has the required minimum contacts, courts focus on the relationship among the  
8 defendant, the forum, and the litigation. *Shaffer v. Heitner*, 433 U.S. 186 (1977). Personal  
9 jurisdiction exists in two forms, general and specific. *Dole Food Co. v. Watts*, 303 F.3d 1104,  
10 1111 (9th Cir.2002). To establish specific jurisdiction, the plaintiff must show that: (1) defendant  
11 purposefully availed itself of the privilege of conducting activities in the forum, thereby invoking  
12 the benefits and protections of its laws; (2) plaintiff’s claims arise out of defendant’s forum-  
13 related activities; and (3) the exercise of jurisdiction would be reasonable. *Easter v. American*  
14 *West Financial*, 381 F.3d 948, 960–61 (9th Cir.2004); *Bancroft & Masters, Inc. v. Augusta Nat’l*  
15 *Inc.*, 223 F.3d 1082, 1086 (9th Cir.2000). If the plaintiff makes a sufficient showing as to the  
16 first two prongs, the burden shifts to the defendant.

17 The purposeful availment prong considers whether the defendant’s conduct has invoked  
18 the forum state’s benefits and protections “such that [the defendant] should reasonably anticipate  
19 being haled into court there.” *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir.1987) (quoting *World–*  
20 *Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297. A defendant “purposefully avails” itself  
21 of a forum when it acts in a way that creates a “substantial connection” with the state, *Burger*  
22 *King*, 471 U.S. 462, 475 (1985), as where it deliberately engages in significant activities there,  
23 *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984), or creates “continuing obligations”  
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1 between himself and the forum state’s residents. *Travelers Health Ass’n v. Virginia*, 339 U.S.  
2 643, 648 (1950).

3 With respect to the second prong—whether jurisdiction is “reasonable” and comports  
4 with “fair play and substantial justice”—the Court has identified several factors: (1) the forum  
5 state’s interest in adjudicating the dispute; (2) the plaintiff’s interest in obtaining convenient and  
6 effective relief; (3) the interstate judicial system’s interest in obtaining the most efficient  
7 resolution of controversies; and (4) the shared interest of the several states in furthering  
8 fundamental social policies. *See Wright, Kane & Miller*, 4 Fed. Prac. & Proc. Civ. § 1067.2 (4th  
9 ed. 2018).

10 *Avocent Huntsville* held that in an action seeking a declaration that the plaintiff’s product  
11 did not infringe (or that the defendant’s patent was invalid or unenforceable), the defendant  
12 patent holder cannot not be haled into the plaintiff’s home jurisdiction solely on the basis of  
13 “cease and desist” letters sent to him there:

14 [B]ased on policy considerations unique to the patent context, letters threatening  
15 suit for patent infringement sent to the alleged infringer *by themselves* do not  
16 suffice to create personal jurisdiction[.] This is because to exercise jurisdiction in  
17 such a situation would not comport with fair play and substantial justice. . . .  
18 Principles of fair play and substantial justice afford a patentee sufficient latitude  
19 to inform others of its patent rights without subjecting itself to jurisdiction in a  
20 foreign forum. A patentee should not subject itself to personal jurisdiction in a  
21 forum solely by informing a party who happens to be located there of suspected  
22 infringement.

19 *Id.* at 1333 (emphasis in original), *citing Silent Drive, Inc. v. Strong Indus., Inc.*, 326 F.3d 1194,  
20 1202 (Fed. Cir. 2003), and *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.23d 1355,  
21 1360 (Fed. Cir. 1998) (other citations omitted).

22 Instead, in order to comport with traditional notions of fair play and substantial justice,  
23 the defendant patent holder must engage in “other activities directed at the forum and related to  
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1 the cause of action.” *Id. Avocent Huntsville* listed examples of activities that would support  
2 jurisdiction, each of which is more substantial than the additional activities Dieu describes here.  
3 They include initiating judicial or extra-judicial patent enforcement within the forum, or entering  
4 into an exclusive license agreement or other undertaking imposing enforcement obligations on a  
5 party residing in the forum. *Id.* at 1334. Even selling patented products in the forum, for  
6 example, is not alone an “other activity” supporting specific personal jurisdiction over the  
7 defendant patentee—a patent gives the holder the right to exclude others from the market, but it  
8 does not convey the right to market an invention. *Id.* at 1336. The focus is therefore on the  
9 holder’s efforts to enforce his patent, not on his efforts to market his own product<sup>2</sup>.

10 Dieu points to activity beyond the letters that relates to the claims Dieu seeks to assert,  
11 and arguably to Hillwig’s “defense of the validity” of his ‘413 patent. *See Avocent Huntsville* at  
12 1334. The conduct he cites bolsters his claim under the more-commonly-disputed “purposeful  
13 availment” portion of the personal jurisdiction analysis. But Dieu does not cite authority directly  
14 supporting his contention that Hillwig’s “additional activities” here—sending not just relatively  
15 innocuous cease-and-desist letters, but publicly accusing Dieu of criminal activity, repeatedly  
16 contacting him at his home, and convincing Amazon to stop selling his product—make it  
17 reasonable to sue him here under Federal Circuit authority. These activities do not amount to the  
18 sort of activity that *Avocent Huntsville* described as enough to satisfy the fair play and substantial  
19 justice prong of that test.

20 Dieu’s most persuasive argument on the latter point emphasizes that Hillwig repeatedly  
21 threatened to sue *him* for infringing on his patent, and that under 42 U.S.C. § 1400(b), if he  
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23 <sup>2</sup> For this reason, Dieu’s request for jurisdictional discovery into whether Hillwig actually sells  
24 his product here is DENIED.

1 followed through he would have been required to do so *here*. See *TC Heartland LLC v. Kraft*  
2 *Foods Group Brands LLC*, 137 S. Ct. 1514 (2017) (Venue for a patent infringement action is  
3 limited to where the defendant infringes and has a regular and established place of business.). As  
4 Dieu points out, it would be more than a little ironic if requiring Hillwig to assert his repeatedly-  
5 threatened infringement claim in this jurisdiction somehow offended “traditional notions of fair  
6 play and substantial justice.” Considerations of the states’ interests and of judicial economy  
7 support would also seem to support litigating the parties’ claims here.

8 But the fact that it would be ironic—counterintuitive, even—does not mean that it would  
9 be unfair under *Avocent Huntsville* or even *TC Heartland*. The former holds that a patent holder  
10 can mount a limited defense from his home without subjecting himself to a foreign jurisdiction,  
11 and the latter holds that if chooses to sue he is required to go to the infringer’s home. They are  
12 not necessarily inconsistent—even if the policy rationales are difficult to harmonize. Hillwig’s  
13 strategic decision to spend time and money avoiding the fight he picked (rather than fighting it  
14 where he is required to) might suggest he is not as confident in his position as he claims. And  
15 absent the Federal Circuit’s authority, the Court would have little trouble concluding it was fair  
16 to force him to do so.

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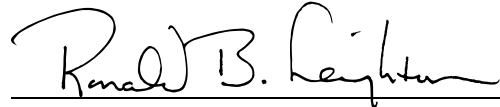
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1 Under *Avocent Huntsville*, however, Dieu has not established that this Court has personal  
2 jurisdiction over Hillwig based on his limited activity here. Hillwig's Motion to Dismiss for lack  
3 of personal jurisdiction is GRANTED and this matter is DISMISSED without prejudice.

4 IT IS SO ORDERED.

5 Dated this 9<sup>th</sup> day of November, 2018.

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8 Ronald B. Leighton  
9 United States District Judge  
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